A valuable alternative to prosecution: the Environment Agency and Civil Undertakings by Tim Green and Gus Baker

Civil sanctions in environmental law: what are they and why they matter?

Since the Court of Appeal Judgement in *R v Thames Water Utilities* [2015] WECA Crim 60, large corporate defendants have known that they face very large fines, in addition to reputational damage and significant clean-up costs, if they are convicted of environmental crime. The sentencing guidelines for environmental offences ("the Guidelines") make it clear that company officers who consent or connive in the offending, or where the offending was attributable to their neglect, can face a sentence of up to 5 years imprisonment, directors' disqualification and a confiscation order for the most egregious conduct. The trial process is draining of time and resources and if a company is convicted, a criminal conviction will almost certainly have to be declared when tendering for public and private contracts. Reputational damage from a criminal conviction is very often the corporate's primary concern.

For all of these reasons, corporate defendants and their officers need to be well aware that accepting a civil sanction enforcement undertaking can be a valuable alternative to prosecution and trial. The Environmental Civil Sanctions (England) Order 2010/1157 ("ECSO 2010"), empowers the Environment Agency ("the Agency") to impose monetary penalties on individuals and corporate bodies in relation to specified offences as a direct alternative to prosecution. Civil undertakings ("CUs") operate like a regulatory sanction without the need for conviction. The Agency has a wide discretion over whether or not to agree a CU and also the terms within any civil undertaking. A CU can be made in response to a pro-active offer from the offender [offer forms can be found on-line] or reactively as a sanction imposed by the Agency. The CU includes a financial penalty which is paid to an environmental charity, restorative steps to remediate

the environmental harm caused and an admission of responsibility. In return the Agency promises not to prosecute the offender. ESCO 2010 makes provision for the Agency to issue notices of intention to take a civil undertaking in the appropriate case.

When will the Agency offer a civil undertaking?

The Agency's enforcement policy describes the factors that will be considered when exercising its discretion whether to prosecute or impose a CU. To avoid a prosecution, a company will need to demonstrate that they have attempted to agree reasonable compensation with any affected third parties. The Agency will consider all the circumstances of the conduct including the levels of harm and culpability. The offender will need to offer a "penalty" by way of a donation to an environmental charity. The penalty offered will need to be consistent with what might follow a conviction in accordance with the Guidelines. In this way the financial savings to the suspect are not great in terms of the avoided fine; but can be considerable in terms of avoiding the risks of litigation, legal costs of a trial and reputational damage that might follow conviction.

The overall effect of the enforcement policy to give the Agency a very wide discretion whether to accept the offer of a CU or not. So far the exercise of this discretion has not been tested in the Administrative Court.

How do civil undertakings work in practice?

The Agency is obligated to publish the cases in which a civil sanction has been imposed. Between 1 February and 31 May 2018, twenty nine enforcement undertakings were accepted by the Agency meaning that around 100 are made per year. What is immediately striking is that these twenty nine CUs were for a wide range of offences including breaches of the Producer Responsibility Regulations, to offences contrary to the Environmental Permitting Regulations and failures to obtain and comply with proper permits in relation to water

discharge activity and breaches of the Salmon and Freshwater Fisheries Act 1975. The penalties also vary greatly in size from less than £3000, to over £100,000. CUs were also imposed on the full spectrum of environmental undertakings from of water utilities to individuals.

It is also obvious from studying the list that around two-thirds of the CUs arose as result of a proactive offer from the offending company to the Agency, as opposed to the offending company reacting to the Agency's intention to impose a CU. This strongly suggests that these companies and their officers were investigated and then decided to offer a CU as an alternative to prosecution, rather than simply waiting on the Agency to react with its own offer of a CU. Unfortunately the list does not show the number of offenders who offered a civil undertaking but were refused or the grounds of any refusal to agree a CU.

It is also important to note that companies that succeeded in persuading the Agency not to prosecute took a comprehensive range of actions to prevent reoffending: including revising risk assessments, hiring new members of staff, registering with environmental schemes, updating staff training and site repair and restoration of facilities.

Strategy and tactics

Experience suggests that the earlier an offer of an enforcement undertaking is given by a company, then the greater the chances of the Agency agreeing to that course. On the other hand, there is no rule in the enforcement policy against the Agency initially refusing a CU only for it to change its mind later. Anecdotal evidence suggests that if the circumstances of a prosecution change dramatically, for example as a result of late disclosure or undermining material or the service of a persuasive defence expert report, then the Agency will review its decision to offer a CU. If the circumstances justify a different exercise of its discretion, the Agency may agree a CU even at the door of the Crown Court.

What is very clear from both the published statistics and from the reports of practitioners, is that the Agency is making regular use of CUs as a direct alternative to prosecution. From its perspective CUs include reporting and co-operation from the environmental industry and are a cost effective means of enforcement. Practitioners will thus need to have CUs in mind at an early stage of an investigation. Whilst it may be possible to persuade the Agency that in some cases no enforcement activity is justified, and in other cases only a trial will defeat the allegations made, in many cases CUs are real and valuable alternative to prosecution.

The real test of skill for practitioners will be in negotiating a CU even where there is significant environmental harm and perhaps a record of past offending. In our view, to give the defendant the best possible negotiating position, early efforts should be made by the defendant to fully mitigate the environmental harm and demonstrate responsibility and lack of culpability. These steps should go hand-in-hand with a policy of deliberately escalating the risks for the Agency should the case go to Court. For example, exercising the right to elect Crown Court trial, use of experts' evidence and complex disclosure arguments can all be deployed by the defendant to put pressure on the Agency to avoid the costs and reputational damage incurred by a long and difficult trial. As with most good deals, for a CU to work there has to be something in it for both sides. To successfully persuade the Agency that a CU is appropriate, some of the most valuable advocacy for the client will need to be done outside of the court room. Settling upon a comprehensive case strategy which fully prepares for a fully contested trial, whilst simultaneously exploring the prospects of resolution, is essential if the opportunity to settle an Agency investigation without a trial are to fully exploited.

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